ORDER

Bangalore, dated 3rd October 1974.

S.O. 2604—

WHEREAS by the State Government Order No. SWL 747 LLD 73, dated 19th December 1973, the Industrial Dispute between the Workmen and the Management of Karnataka State Road Transport Corporation, Sirsi Division, North Kanara District was referred to the Labour Court, Hubli for adjudication.

AND WHEREAS the Labour Court, Hubli has submitted to the State Government its award in respect of the said Industrial Dispute.

NOW, THEREFORE, in exercise of he powers conferred by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947), the Government of Karnataka are pleased to direct the publication of the said award as above, in the *Karnataka Gazette.*

[No. SWL 197 LLA 74.]

By Order and in the name of the Governor of Karnataka,

K. MYLARAPPA,
Under Secretary to Government,
Social Welfare and Labour
Department.

GOVERNMENT OF KARNATAKA

SOCIAL WELFARE AND LABOUR DEPARTMENT

Labour dispute.—Industrial dispute between the workmen and the management of Manjunatha Motor Service, Udipi.

Award of the Presiding Officer, Labour Court, Mangalore, published.

Read the following papers.

(1) Letter No. A/ID-66/74-75, dated 16th September 1974 from Sri H. S. Venkatasubbaiah. Presiding Officer, Labour Court, Mangalore.

BEFORE THE LABOUR COURT AT MANGALORE

Dated : 16*th September* 1974

Reference (ID) (LCM) No. 66 of 1969

Present :

H. S Venkatasubbaiah, B.A.,LL.B., *Presiding Officer*

BETWEEN :

I Party.—

The workmen, represented by the Secretary, S. K. Automobile and Engineering Workers' Union, Maidan Road, Mangalore.

AND

II Party.—

The Management of Manjunatha Motor Service, Udipi.

AWARD

The Government of Karnataka being of the opinion that an Industrial Dispute exists between the workmen and the management of Manjunatha Motor Service. Udipi, have referrend the same for adjudication to this court by their order No. FCL 461 LLD 69(1) dated 15th November 1969, under Section 10(1) (c) of the Industrial Disputes Act. 1947. The points of dispute as specified in the order of reference are the following :—

"I. Are the Management of Manjunatha Motor Service. Udipi, justified in terminating the services of Shri Tukaram Prabhu with effect from 20th August 1968 ?

and refusing to pay bonus to the said workman for the years 1964, 1965, 1966, 1967 and 1968 (upto the date of his termination)?

II. If not, to what reliefs is the said workman entitled ?"

2. In the claim statement filed by the first party it has been sated that the second party is a transport company running passenger bus services on various routes in the district and that the first party was working as an employee of the second party as a Booking clerk at Dharmasthala, South Kanara and that he joined the service on 10th September 1953. That he was appointed by the then proprietor of the second party the late Shri K. Gopala Shetty and at that time his salary was fixed at 3 per cent of the total passenger fare collection at Dharmasthala subject however to a minimum of Rs. 30 per month and that later in 1958 the percentage rate was increased to 5 per cent and that the appointment was oral but in the presence of Sri P. Narayanayya (since deceased) and Sri D. Subrahmanya Adiga and that one of the terms of appointment was that in the event of the first party's services being dispensed with he would be paid a lumpsum amount at the rate of

Rs. 10 for each month's service rendered by the first party. Further it is alleged that on account of the nationalisation of certain bus routes in the district the running of the second party's bus beyond Guruvayankere upto Dharmasthala was prohibited from 21st August 1968 and the services of the first party were dispensed with by the second party and that the second party did not pay the lumpsum amount on his services being dispensed with as per the term of contract of appointment nor any compensation was paid to him as per the provisions of law and that the second party declared and paid bonus for the years 1964 to 1968 at the rate of two month's salary for each year and the same has not been paid to the first party and that the termination of the first party's services without complying with the mandatory provisions of law is illegal especially in view of the fact that junior booking clerks continued to be in service. Finally it was prayed that the second party be directed to reinstate the first party workman with full backwages and continuity of service or such other reliefs and also to pay the bonus for the years 1964 to 1968 *i.e.*, till the date of termination, with costs.

3. The counter statement filed by the second party was to the effect that the present dispute is not an industrial dispute as contemplated by the Industrial Disputes Act. 1947 and therefore this Court has no jurisdiction to adjudicate upon this matter. It is contended that there was no employer and employee relationship between the second party and the first party. That the second party is a transport company and the first party workman Sri Tukaram Prabhu was acting as a Booking Agent under the Agency Scheme as independent contractor to book passengers for the buses of the second party at Dharmasthala and that Sri Tukaram Prabhu was being paid a commission on the total monthly bookings he did for the second party concern and that besides acting as the booking agent on commission basis for the second party concern, Sri Tukaram Prabhu was working as commission

agent for other transport companies who had their buses plying from and through Dharmasthala simultaneously and at one and the same time and therefore the second party had no controller direction over the said Tukaram Prabhu and also the time of Sri Tukaram Prabhu was not at the disposal of the second party and hence the first party is not a workman as defined under Section (2) (s) of the Industrial Disputes Act. It is stated that the second party concern lost its bus routes plying from and through Dharmasthala in August 1968 because of nationalisation of the passenger transport in the district. It is denied that the second party is liable to pay any bonus to Sri Tukaram Prabhu for the years 1964 to 1968 as he was not a workman.

4. On the above pleadings, the following additional issues have been framed :—

(1) Whether the present dispute is an industrial dispute and this Court has jurisdiction to adjudicate upon this dispute ?

(2) Whether there was relationship of employer and employee between the second party and the first party and whether the first party was 'workman' as defined under Section 2(s) of the I.D. Act, 1947 ?

OR

Whether the first party was working as commission agent under the second party and also under other transport companies who had the business of plying the bus service from and to Dharmasthala and as such the second party had no control or direction over the first party Sri Tukaram Prabhu'?

(3) Whether the first party is entitled to bonus for the years 1964 to 1968 after the date of termination of his service ?

(4) What award ?

5. The first party Sri H. Tukarama Prabhu has been examined as W.W. 1 before this court. The documents filed on behalf of the first party have been marked as Exhibits W-1 to W-34. On behalf of the second party management Sri K. Narayana Shetty, Manager of Sri Manjunath Motor Service Udipi, H. Gunasheel Ballal, Director of the West Coast Industrial and Commercial Syndicate Limited, B. S. Jayaram, clerk in Bharath Motor Service, Sri Subbanna Hegde, Bus Agent and Sri S. M. Maka, Handwriting Expert, have been examined as M.W. 1, M.W. 2, M.W. 3, M.W. 4 and M.W. 5 respectively. Exhibits M-1 to M-47 have been got marked on behalf of the second party management.

6. These facts are not disputed. The second party Sri Manjunatha Motor Service was owned by one K. Gopala Shetty who died in December 1958. Sri K. Narayana Shetty, M.W. 1, who is the wife's brother of the said Gopala Shetty is serving as a manager of the second party from 1953. In 1953 the second party Sri Manjunatha Motor Service started plying a bus from Udipi to Dharmasthala *via* Karkal, Moodabidri, Venur, Guruvainkere, Belthangady and Ujire and back in the same route. The first party workman Sri Thukaram Prabhu was canvassing passengers and booking passengers in the said bus at Dharmasthala. He was working in the second party from 10th September 1953. The first party workman was also booking passengers for Ballal Motor Service, Bharath Motor Service, W.C.I. & C.S. Ltd., Mangalore, etc., at Dharmasthala. After 1968 August the said bus of the second party was restricted upto Guruvainkere only as beyond the route was nationalised and the said bus could not ply beween Guruvainkere and Dharmasthala on account of that. Guruvainkere is at a distance of 11 miles from Dharmasthala. As a consequence of the nationalisation, the first party workman was not able to book passengers at Dharmasthala from 20th August 1968.

7. Now it is the case of the first party, as stated in the claim statement, that he was a Booking Clerk working under the second party and as such an employee of the second party at Dharmasthala. It is stated that his appointment was oral and that the then proprietor Sri K. Gopala Shetty appointed him and at that time his salary was fixed at 3 per cent of the total passenger fare collection at Dharmasthala subject, however, to a minimum of Rs. 30 per month and that later on in 1958 the percentage rate was increased to 5 per cent and that the appointment was oral, made in the presence of Sri P. Narayanayya (since deceased) who was a 'Parupathyagara' and one Sri D. Subrahmanya Adiga. It is also the case of the first party that one of the terms of appointment was that in the event of the first party's services being dispensed with he would be paid a lumpsum amount at the rate of Rs. 10 for each month's service rendered by him and that his services had been dispensed with on account of nationalisation and that the second party did not pay the lumpsum amount on his services being dispensed with as per the terms of contract of appointment nor any compensation was paid to him as per the provisions of law and that he had also not been paid bonus for the years 1964 to 1968 at the rate of two month's salary for each year and that his termination without complying with the mandatory provisions of law is illegal, more so in view of the fact that junior booking clerks continued to be in service even today. The case of the second party, on the other hand, is that there was no 'employer' and 'employee' relationship between the second party and first party and that the first party was acting as a Booking Agent under the Agency Scheme as an independent contractor to book passengers for the buses of the second party at Dharmasthala and that the first party was being paid a commission on the total monthly bookings he did for the second party concern and that the second party had no control or direction over the first party Sri Tukaram Prabhu and that the first party was not a workman as defined under Section 2(s) of the Industrial Disputes Act.

8. The first two additional issues framed in this case are inter-related and the same can be considered together. If it is held that the first party workman was not a 'workman' as defined under Section 2(s) of the Industrial Disputes Act and that he was independant commission agent working under the second party, then it must be held that the present dispute is not an Industrial Dispute and this court has no jurisdiction to adjudicate upon the same.

9. Coming to the evidence, the first party workman has examined himself as W.W. 1. His evidence was to the effect that he was working as a Booking Clerk on a salary basis of Rs. 30 per month plus commission at 3 per cent on the fare collections subject to a minimum of Rs. 30 and that he joined the second party on 10th September 1953 and that the commission was increased to 5 per cent from September 1958 subject to a minimum of Rs. 30 per month and in the year 1956 the proprietor of the second party got him an authorisation to work as a booking clerk from the Regional Transport Authority. South Kanara and that the second party had supplied him with a true copy of the said order (which the first party produced at the time when he was examined on 25th August 1970. According to his evidence, for his appointment with the second party the 'Parupathyagara' of Dharmasthala by name Sri Narayanayya and one Sri D. Subrahmanya Adiga had talked with the proprietor of the second party and the terms of his appointment and his salary, etc., were settled by them on his behalf with the proprietor of the second party Sri K. Gopala Shetty and that Gopala Shetty had orally agreed that in case his (first party's) services were terminated, he would be paid compensation at Rs. 10 for each month of service and further that he would be paid bonus and that he (Gopala Shetty) also agreed to pay him (first party) 5 per cent of the fares subject to a minimum of Rs. 30 per month from September 1958 and that he (first party) accepted those terms and joined the services of the second party and that his services were terminated on 21st

August 1968 by the second party on account of natonalisation of the bus routes from Guruvainkere to Dharmasthala and as the second party's buses had to terminate their trips at Guruvainkere. In his claim statement, the first party has stated that his appointment was oral. But in cross-examination he has stated as follows :—

"I was working under the second party since September 1953. There was an appointment order issued to me by the second party but I am not in a position to produce the same in court to-day."

So, according to his evidence in cross-examination he had been issued an appointment order. But he has not produced the same in this court. M.W. 1 Sri K. Narayana Shetty, who is the Manager of Sri Manjunatha Motor Service, Udipi *i.e.*, the second party, has stated that the second party issues appointment orders to their workers. He has characterised Ex. W-1 as a rank forgery and he has stated also that the alleged signature said to be that of Gopala Shetty, his late brother-in-law, was a forgery. Now, with regard to the oral evidence adduced on behalf of the first party, it must be held that excepting the self-serving statement of the first party, there is absolutely no evidence to show that he was appointed as a Booking clerk on a salary of Rs. 30 per month plus commission at 3 per cent on fare collections and that he was given an appointment order. He has also not proved the terms of his appointment and his salary etc. which according to him. were fixed at the intervention of one Sri P. Narayanayya and Sri D. Subrahmanya Adiga. Of course Sri Narayanayya is dead. But according to the evidence of W.W. 1 Sri Subrahmanya Adiga is alive. This Sri Subrahmanya Adiga has not been examined by the first party. No reason has been given by the first party as to why he has not been examined by the first party. There is also no evidence to show that Sri Subramanya Adiga is not on good terms with the first party workman or that he was not willing to depose in this case. Therefore, it must be held that the evidence of the first party that he was appointed as

a Booking Clerk on a minimum salary of Rs. 30 per month plus commission at 3 per cent subject to a minimum of Rs. 30 per month has not been corroborated by any other evidence. It was easy for the first party to have examined Sri Subrahmanya Adiga to prove as to what were the terms of his appointment. It was also easy for the first party workman to have produced the appointment order even subsequently if he had it with him. When he has not produced the alleged appointment letter. it must be held that there is no such letter or if there was such an appointment letter with him, the evidence would have gone against him if he had produced the same in court. So also an adverse inference will have to be drawn that if he had examined Sri Subrahmanya Adiga, his evidence would have gone against him. Hence, in my opinion, much reliance cannot be placed on the oral evidence of the first party workman with regard to his appointment and the terms of his appointment.

10. Coming to Ex. W-1, this document has been produced by the first party workman only at the time when he was examined as a witness in this court on 25th August 1970. It has been suggested to him in cross-examination that the entire Ex. W-1 was a forged document prepared by him and the signature of Gopala Shetty marked as Ex. W-1(a) had been forged by him and that Ex. W-1(a) was not the signature of late Sri Gopala Shetty. Of course the first party had denied those suggestions. Ex. W-1 is said to be a true copy of the extract from the Proceedings of the Regional Transport Authority South Kanara dated 4th August 1956. It reads as follows :—

" Extract from the Proceedings of the Regional Transport Authority South Kanara, Dated 4th August 1956.

Item No. XV

Present Sri M. G. Rajaram. I.A.S.

Subject :—

To consider the question of granting Booking Clerk authorisation to Book tickets under Rule 222 of the

40 to the following persons, at the places r ted against each.

(1) Tukaram Prabhu Dharmasthala. (C. No. 7507/A7/56)

Decision of the Regional Transport Authority :—

" Authorisation applied for is granted in all cases "

(Sd.) M. G. Rajaram, dt. 4-8-56
Regional Transport Authority, South Kanara.

(True copy)

Office of the Secretary, Regional Transport Authority, South Kanara, dt. 7-8-56.

D. Dis. 7507/56

Communicated to the applicants and all the Candidates.

Signed 10–5–56.

Secretary, Regional Transport Authority. South Kanara, Mangalore-2.

Copy to—

H. Tukaram Prabhu B.C. Dharmasthala.

(Sd.) (in Kannada)
K. Gopala Shetty.
Shri Manjunatha Motor Service Udipi."

According to the true copy, the original of the same is said to have been issued under Rule 222 of the Motor Vehicles Rules 1940 as prevailing in Madras State at that time. It is said to have been signed by M. G. Rajaram Regional Transport Authority, South Kanrara on 4th

August 1956. According to Ex. W-1 it has been communicated to the applicants and all the candidates. So it should have been communicated to the first party workman also by the Secretary, Regional Transport Authority. South Kanara. If he had been communicated like that. the first party workman should have been in possession of that copy. He has not produced that copy. The first party workman, in his cross-examination, has stated to the effect that Ex. W 1 was handed over to him by Late K. Gopala Shetty, Proprietor of Manjunath Motor Service, in Mangalore after getting it typed in Auditor Karunakarrao's office and that he (first party) had seen the original of Ex. W 1. He also states that he had not submitted any application to the R.T.A. to issue booking clerk authorisation and that it was late K. Gopala Sheety who submtited the application to the R.T.A. for the issue of said authorisation to him. He has also stated that he did not attend the meeting of the R.T.A. on 4th August 1956 and that he had given an application to late K. Gopala Shetty to appoint him as a booking clerk. It has been suggested to him that in 1956 Sri N. G. Rajaram I.A.S. was not the chairman of R.T.A. South Kanara. In re-examination he has stated that at the time when he was issued the authorisation to work as booking clerk. The District Collector was Sri Rajaram and that he was also the chairman of R.T.A. at that time and that he (first party) had applied for a certified copy of the proceedings of the R.T.A. meeting held on 4th August 1956 when he was given an authorisation to work as a booking clerk and that he had not received the certified copy and that when he would receive it he would produce it before court. But till now no certified copy has been produced by W.W. 1, the first party. W.W-1 has also not placed any evidence to show that Sri Rajaram I.A.S. was the R.T.A. at the relevant time when the original of Ex. 1 is alleged to have been issued.

11. Ex. W-1 had been sent to the Handwriting expert for his opinion about the genuineness of the signature of late Sri K. Gopala Shetty at Ex. W-1(a) after comparing

the same with the admitted signature of late K. Gopala Shetty on Ex. M-38 at M-38(a), Ex. W-18 at W-18(a) and Ex. M 41 at S 1 to S-5. Ex. M-38 is the will executed by late Sri K. Gopala Shetty. Ex. W-18 is a letter written by late K. Gopala Shetty to the Booking Clerk at Dharmasthala (marked in (ID) No. 66/69 on the file of this court) and Ex. M-41 is a Memorandum of Agreement dated 17th October 1958 entered into between the West Coast Industrial and Commercial Syndicate Ltd., by Sri A. Narayana Hegde and K. Gopala Shetty. The Handwriting expert Sri S. N. Maka, who has been examined before this court as M.W. 5, has given his opinion (which is also contained in Ex. M-42) alongwith his reasons as follows :—

" I conducted detailed examinations of the disputed signature Exhibit W-1 (a) with those of S-1 to S-5 in Exhibit M 41 and exhibits M 38(a) and W-18(a). Subject to natural variation I found the following dissimilarities in between them i.e.. Exhibit W-1(a) and the other signatures.

1. Formation of letters was not similar in both. Both I mean disputed and admitted signatures.

2. Skill of the writing was not the same i.e., in disputed it was very poor while in the admitted it is medium.

3. Movement of the writing was not the same i.e., in disputed signature the movement is not uniform and in standard signature movement by fingure wrist movement and there is uniformity of movement.

4. Muscular incordinations were not at similar places.

5. Pen pressure was not the same *i.e.*, in disputed signature there is no uniformity of pen pressure throught the signature while in the admitted signatures pen pressure were heavy and uniform throughout the signatures.

6. Pen lifts were not at similar places *i.e.*, in disputed there are about six pen lifts while in admitted signatures in general there are nine pen lifts.

7. Line quality as not the same *i.e.*, in disputed signatures there was unequal pressure of pen lifting of pens in unlikely places and careful superimpossions of strokes, drawn and laboured nature of strokes while there is not so in admitted signatures.

8. Size of the letters was varying—spacing between the letter was varying.

9. Spacing between the letters was varying.

10. Connecting strokes was not the same.

In addition to the above there is one point of similarity *i.e.*, style of the writing was the same, since it is a free hand forgery the letters are scratchy and awkward type of letters. In view of the above reasons I am of the opinion that the disputed signature marked as Ex. W-1(a) is not in the hand-writing of the same person who wrote Ex. M-38(a), W-18(a) and S-1 to S-5 in Ex. M-41."

Taking into consideration the reasonings given by Sri S. M. Maka, as mentioned above, it must be held that the similarities between the admitted and disputed signatures are very little and the points of dissimilarities are many and therefore, there is no reason to discard the opinion of the handwriting expert. Atleast it can be safely held that the first party has not proved that the signature found in Ex. W-1(a) is that of late Sri Gopala Shetty. Taking into consideration that the first party workman had not produced Ex. W-1 along with the other documents which he produced at an earlier stage in this court and taking into consideration that he had not produced a certified copy of the proceedings alleged to have taken place relating to the original of Ex. W-1 and also in view of the fact that he has not proved that Sri N. G. Rajaram was the

Regional Transport at that relevant time, it must be held that no reliance can be placed on Ex. W-1 to hold that the first party workman had been given a certificate as per the original of Ex. W-1.

12. The first party workman has been described as a B.C. or Booking Clerk in many letters written by the second party. He has also been described as an Agent and the first party workman has described himself as a Booking Agent in some of the documents written by him to the second party. Ex. W-2 is a letter written by the second party to the first party on 1st May 1963 wherein the first party has been addressed as B.C. Dharmasthala. So also in the letter Ex. W-3 Thukarama Prabhu, the first party workman, has been described as B.C. Dharmasthala. Ex. W-3 is dated 5th September 1964. So also in Exhibits W-5 dated 17th November 1960, W-6 dated 23rd December 1964, W-7 dated 5th April 1965, W-9 dated 26th March 1966, W-10 dated 27th April 1959, W-11 dated 20th April 1961, W-12 dated 21st October 1964, W-13 dated 17th July 1965, W-14 dated 25th March 1966, W-17 dated 4th May 1961, W-19 dated 29th March 1963, W-20 dated 29th March 1963, W-21. W-22, W-23 dated 12th December 1958, W-24 dated 3rd February 1966, W-25 dated 23rd January 1956, W-26 dated 27th January 1956, W-27 dated 6th September 1958, W-28 dated 29th January 1956, W-29 dated nil, Ex. W-30, Ex. W-31 dated 2nd November 1956, W-32 dated 21st April 1958, the first party workman has described himself as an agent in These are letters or communication written by the second party to the first party. On the other hand, the first party workman has described himself as an agent in the letter written by him to the second party on 12th December 1967 (from the Agent Dharmasthala) and also in the receipt he has given on 2nd September 1968 (..... on termination of my appointment as booking agent, Dharmasthala). In Ex. W-2 dated 1st May 1963 produced by the first party although the first party has been described as B.C. Dharmasthala, in the body of the letter

it has been stated to the effect that the bonus has not been paid to any other agent and that it has been paid only to him (first party). So, if this letter is taken into consideration, it is evident that the first party workman was treated as an agent by late Sri Gopala Shetty and also by the second party. In the earliest letter Ex. W-4, dated 21st December 1962 relied on by the first party workman, he has been described as an agent (ನಮ್ಮ ಧರ್ಮಸ್ಥಳ ಏಜೆಂಟ್ ತುಕಾರಾಮರ ಬೋನಸಿನ ವಿಚಾರದಲಿ .....). This letter which has been written by the second party to one Narayanayya (by Narayana Shetty (M.W. 1) who is the manager of the second party), it has been written, among other things, to the effect that he had received the letter written by Narayanayya with regard to bonus matter and that bonus amount would be paid to Dharmasthala Agent, Tukaram. In another letter relied on by the first party as per Ex. W-18, dated 15th December 1965 and signed by late Sri Gopala Shetty who was the owner of the second party, he (first party) has been described as Dharmasthala Booking Clerk. Sri K. Narayana Shetty, M.W. 1 has admitted that the signature in Ex. W-18 was that of the proprietor late Sri Gopala Shetty. So it is very clear that the first party workman has described himself as an Agent and that the second party has also described him as a Booking Clerk. It was argued and it was not disputed that mere nomenclature would not itself indicate as to whether a particular person was a Booking Agent or a Booking Clerk. The entire circumstances including the nature of work done by the first party workman have to be taken into consideration to come to the conclusion whether the first party workman was a Booking Agent on Commission or a Booking Clerk who was paid salary and also commission.

13. M.W. 1 Sri K. Narayana Shetty, Manager of Sri Manjunatha Motor Service, Udipi, has in his evidence, clearly stated to the effect that the first party workman was working as Booking Agent and not as a Booking Clerk. He has also stated to the effect that there were similar booking agents in the second party concern and that their

names were not found in any of the registers maintained under the Motor Transport Workers Act, 1965. He has produced the acquittance roll for the year 1966-67, acquittance roll from January 1968 to December 1968 marked as Ex. M 30 and M-31 respectively and has also produced the muster roll for 1967-68 marked as Exhibits M-32 and M-33. In none of these registers, the name of Tukaram Prabhu, the first party workman, is found. On the other hand, the evidence of M.W. 1 makes it very clear that Ex. M-34 was the register showing the payment of commission to the booking agents for the year 1966 November to July 1968 and that Thukaram Prabhu's name is found in the said register at Ex. M-34(a) along with the names of other agents. So also his evidence makes it very clear that Ex. M-35 which is the cash book for the year 1967, commission is shown to have been paid to Thukaram Prabhu and other agents as mentioned at page 14. Thus, from the documentary evidence produced by the second party it is clear that he was treated as a Booking Agent and not as a Booking Clerk and that he was not paid any monthly salary and that he was paid only commission on the basis of the booking collections made by him. Of course, the second party has not produced the Bonus Registers for the years from 1958 to 1963 although the first party workman called upon the second party to produce the same. But on that account alone it cannot be held that in those registers the first party workman was shown as an employee of the second party concern.

14. The first party workman has not adduced any other evidence excepting his own oral evidence to show that it was agreed that he was to be paid a minimum monthly salary of Rs. 30 *plus* commission at 3 per cent on the fare collection, subject to a minimum of Rs. 30 per month. In the debit vouchers, the first party workman has signed for having received the commission charges. Tukaram Prabhu, first party workman, has admitted his signatures on Ex. M-9 to M 15. These are all debit vouchers signed by him. In all these vouchers it has been

stated that the amounts mentioned therein were paid as commission for a particular month, *i.e.*, for months of February 1968 to August 1968 (Exhibits M-9 to M-15). In none of these debit vouchers the various amounts paid as salaries has been mentioned. It is admitted that Thukaram Prabhu was also workig as a commission agent for W.C.I. & C.S. Ltd., Mangalore and Bharath Motor Service and that he has signed the debit vouchers relating to those companies as per Ex. M-1 to Ex. M-7 and Exhibits M-16 to M-28. In those receipts also it has been mentioned to the effect that commission has been paid to the agent of those companies. Thus, it is very clear from the documents produced by the second party that the first party workman was only a Commission Agent and that he was not paid any salary on monthly basis and also commission. I feel that the evidence adduced by the second party is more reliable with regard to this aspect of the case than the evidence let in by the first party workman. Therefore, I have no hesitation to come to the conclusion that the first party workman was only a Commission Agent and not a Booking Clerk on a salary of Rs. 30 per month plus commission at a certain percentage.

15. It is true the first party workman's representative submitted that from certain documents produced in this case it could be gathered that the first party workman was under the control of the second party and that therefore, it must be held that he was a paid servant and that he was not a Booking Agent. For that purpose, the first party relies on Ex. W-5 dated 17th November 1960. It is a letter written by the second party to the first party in which the second party had asked the first party to make arrangements for the clerks who had been sent from the Head office to Dharmasthala to book for the special buses from Dharmasthala. The first party also relies on Ex. W-6 dated 23rd December 1964 written by the second party to the first party in which they have asked the first party to send time-list of all the services starting from Dharmasthala and also the list of all stations between

Periyashanthi and Hosmatha main road, name and rate lists to the Head office and Ex. W-7 dated 5th April 1965 in which they have asked the first party to give charge of the conductor for MYX 4488 to Velerine D'Souza who had taken that letter from the second party to the first party workman. The first party workman also relies on Ex. W-9 dated 26th March 1966 in which the first party had been asked to book tickets at the same rate as other companies were doing, etc., from Dharmasthala to Subramanya. Ex. W-10 is another letter written by the second party to the effect that the first party workman was overloading the buses and that he was asked by the Head office not to overload the buses and that action would be taken in accordance with the company's rules in case the direction is disobeyed. Ex. W-8 is a circular given to line conductors and booking clerks with regard to the work they have to do and directing them that they should abide by the rules of the company. So also Ex. W-11, W-12, W-13, dated 17th July 1965 and W-14, dated 25th March 1966 certain instruction to first party workman and Ex. W-15 dated 21st February 1957 contain instructions to all booking clerks, line conductors and drivers and Ex. W-16 is a circular addressed to all the line conductors and booking clerks not to collect certain bronze coins, etc. From the above letters it is clear that the second party company was giving instructions to the first party workman also to do certain services and also to abide by the company's rules, etc. But the above documents will not go to show that the first party was under the control of the second party. It cannot be disputed that even an independent commission agent can also be given instructions by the principal who has appointed him as an agent and he may be also requested to do certain services. By doing so, an independent commission agent will not become the employee of the principal, but he continues to be a commission agent. Therefore, in my opinion, the control test relied on by the first party workman will not apply to him and in my opinion, he was not under the exclusive control of the second party and he was only being given instructions as

booking agent and not as an employee of the second party concern.

16. M.W. 4 Sri Subbanna Hegde has in his evidence, stated to the effect that he was working as a Bus Agent at Mulky from 1923 upto the date of his examination in this court and that he was also working as a booking agent for B.M.S., S.C.S., B.N.S., Krishna Motor Service, Krishna Travels and West Coast on commission basis. In my opinion, his evidence is not very material for the purpose of this case.

17. No doubt the first party workman has stated to the effect that he had to be present at the Bus stand at 9 A.M. and at 10 A.M. the bus from Udipi would reach Dharmasthala and that at 10-30 A.M. the same bus would ply to Belthangady and back by about 11-30 or 12 NOON and that the same bus would go upto Ujire at 1-45 P.M. and would return at 2-30 P.M. or 2-45 P.M. and the same bus would start at 3-30 P.M. to Udipi and for all those trips he had to book the tickets for the passengers and that he had to be in the stand from 9 A.M. to 3-30 P.M. on his duty. On the other hand, Sri K. Narayana Shetty in his evidence, has stated that the second party had only one bus to ply to Dharmasthala and that it used to reach Dharmasthala at 9-30 A.M. after starting from Udipi at 5-30 A.M. and that it was plying to Ujire as cut service from Dharmasthala. Further he has stated that it used to leave Dharmasthala at 10 A.M. to go to Ujire and subsejuently that cut trip to Ujire was extended upto Belthangady and that it used to return from Belthangady to Dharmasthala at round about 1-30 P.M. and then again that bus used to ply to Ujire as cut service and after returning from Ujire it used to leave for Udipi trip at 3-30 P.M. and that Tukarama Prahu was at Dharmasthala to issue tickets to passengers of the second party's bus coming to Udipi. So it is no doubt true that the first party workman had to be in the bus stand in between 9 A.M. and 3-30 P.M. to do his work as a Booking Agent and for that he was getting com-

mission. Merely because he was present during the said in the bus stand to book passengers, it cannot be held that he was a Booking Clerk getting monthly salary. Sri P. Ghate, who was appearing for the first party, submitted that all the above mentioned circumstances should be taken into consideration and it must be held that Tukaram Prabhu was a Booking Clerk and not a independent Booking Agent. But I am unable to accept his argument for the simple reason that from the above circumstances alone it cannot be held that the first party workman was working as Booking Clerk and an employee of the second party concern.

18. It is also true that Sri Tukarama Prabhu relies on one more point *i.e.*, with regard to the payment of bonus. It is true it is in the evidence of the first party workman that he was paid Rs. 60 as bonus for the years from 1958 to 1963 at the rate of Rs. 60 per month. It is also true, he has stated that bonus paid to him was equal to two months' salary. But in my opinion, although bonus was paid to him, it cannot be held that he was paid any salary or any amount as salary per month. Ex. M-29 is a notice got issued by the first party workman to the second party through the S. K. Automobile and Engineering Workers Union, Mangalore on 1st October 1968. In that notice it has not been mentioned that a salary of Rs. 30 was fixed up for Tukaram Prabhu. M.W. 1 has in his evidence stated that no amount was paid as bonus to the first party and that he had written in Ex. W-2 that Rs. 60 was paid in the form of bonus and that he did not mean that it was paid as bonus. Eeven in the letter written as per Ex. W-2 it has been written that bonus was not paid to any other agent and that it was paid only to him (first party) in the form bonus. In Exhibit W-4 it has been clearly written that Tukaram Prabhu was an agent and bonus would be paid to him. So merely because the first party workman had been paid some amount as bonus, it cannot be held that he was an employee of the second party concerned. Bonus can be paid even to agents. (See 1957 I LLJ 645

between Kesava Reddiar (K) (gold merchant) and Labour Appellate Tribunal of India, Madras and others) Mere payment of bonus will not convert a person who is an agent into an employee. So even if that circumstance is also taken into consideration, I am of the opinion that it cannot be held that the first party workman was an employee of the second party, *i.e.*, a Booking Clerk as contended by him.

19. No doubt at the time of evidence it has been suggested to the first party workman that he was running a cutlery shop and soda factory. The first party workman has denied the suggestion. Excepting the interested testimony of Sri K. Narayana Shetty to the effect that beside canvassing business the first party workman was having a Soda Factory and cutlery shop also, there is absolutely no other evidence to support his evidence. Hence it cannot be held that the first party was doing that business.

20. For all the reasons stated above, I hold that the first party workman was working as a commission agent under the second party and also under other transport companies who had the business of plying the bus service from and to Dharmasthal and that the first party workman was not a paid Booking Clerk of the second party. It must be held that it was not a contract of service, but a contract for service.

21. Although I have come to the conclusion that the first party workman was only an independent agent, from the facts of the case, yet it must be seen whether he was an employee of the second party under law. The Motor Transport Workers Act, 1961 (27 of 1967) came into force with effect from 1st February 1962. That Act provides for the welfare of motor transport workers and regulates the conditions of their work. In the said Act. an employer has been defined under Section 2 (e) as follows :—

"'employer' means, in relation to any motor transport undertaking, the person who, or the authority which, has the ultimate control over the affairs of the motor transport undertaking, and where the said affairs are

entrusted to any other person whether called a manager, managing director, managing agent or by any other name, such other person;"

Under Section 2(h) of the said Act, a motor transport worker has been defined as follows:—

"'motor transport worker' means a person who is employed in a motor transport undertaking directly or through an agency, whether for wages or not, to work in a professional capacity on a transport vehicle or to attend to duties in connection with the arrival, departure, loading or unloading of such transport vehicle and includes a driver, conductor, cleaner, station staff, line checking staff, booking clerk, cash clerk, depot clerk, time-keeper, watchman or attendant, but except in section 8 does not include—

(i) any such person who is employed in a factory as defined in the Factories Act, 1948 (63 of 1948);

(ii) any such person to whom the provisions of any law for the time being in force regulating the conditions of service of persons employed in shops or commercial establishments apply;"

The definition of motor transport worker under that Act makes it very clear that a person who is also employed in a motor transport undertaking directly or through an agency, whether for wages or not, to attend to the duties in connection with the arrival, departure, loading or unloading of such transport vehicle, becomes a motor transport worker. Thus in my opinion a person who attends to the loading of a transport vehicle with passengers, whether for wages or not, also becomes a motor transport worker irrespective of the fact whether he is called Booking Agent of a Booking Clerk and whether he is paid actual wages or commission.

22. Section 37(1) of the Motor Transport Workers Act, 1961 reads as follows :—

"37. (1) Effect of laws and agreements inconsistent with this Act.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of this Act :

Provided that where under any such award, agreement contract of service or otherwise a motor transport worker is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the motor transport worker shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.

The above section makes it very clear that the provisions of that Act shall have effect notwithstanding anything inconsistent therewith contained in any agreement or contract of service, whether made before or after the commencement of that Act. Applying the above law to the facts of the case, it becomes very clear that inspite of the fact that the first party was acting only as an independent contractor or agent prior to the passing of the Act, he became a motor transport worker under the second party passing of the said Act. It should be noted that the Motor Transport Wtrkers Act has no retrospective effect. It is not disputed that the second party is a motor transport undertaking. Therefore, I am of the opinion that the first party workman became a motor transport worker from 1st February 1962 under the Motor Transport Workers Act, 1961, and the second party management became his employer from that date. Therefore, it must be held that there was relationship of employer and employee between the second party and the first party from that day *i.e.*, from 1st February 1962.

23. It is not disputed that the first party was booking passengers for other motor services who had their buses plying from and to Dharmasthala. According to the evidence of the first party workman, he did so with the permission of the second party. But in the case, it will not matter whether he did so after getting permission from the second party or not for the simple reason that now it is an established law that a worker can work in more than one establishment. (See 1973 II LLJ. P. 495 Supreme Court between Silver Jubilee Tailoring House and others and Chief Inspector of Shops and Establishments and another.)

24. 'Workman' as defined under the Industrial Disputes Act, 1947 (Section 2(s)) includes any person who has been employed to do clerical work for hire or reward, whether the terms of employment be expressed or implied. It cannot be disputed and it must be held that the first party workman Thukaram Prabhu was doing clerical work when he was booking passengers as booking agent at Dharmasthala. Therefore. in my opinion, it must be held that he was a 'workman' as defined under Section 2(s) of the Industrial Disputes Act, 1947. It must also be held that under Section 2 (g) of the Industrial Disputes Act, the second party is an employer.

25. The present dispute should be considered as an Industrial Dispute as I have held that there was a relationship of 'employer' and 'employee' between the second party and the Ist party at the time when the service of the first party workman was terminated. Hence it must be held that the present dispute is an Industrial Dispute and that this court has jurisdiction to adjudicate upon the same.

26. It was contended by Sri Eric Sequeira, representative for the second party, that the second party must be considered free to so arrange his business that he avoids a regulatory law and its penal consequences and that appointment of commission agents for the purpose of booking pas-

sengers is an avoidance of the regulatory law and he relies on a decision of the Supreme Court reported in A.I.R. 1968 S.C. 503 between Ghatge and Patil Concerns' Employees' Union, Appellant v. Ghatge and Patil (Transports) Private Ltd. and another. But in my opinion his argument has no force. The case which was decided by the Supreme Court related to the drivers who had resigned their services of the company and who had entered into contract with the company to ply trucks on fixed hire. In this case there is no resignation of the first party workman. The principles of law laid down in that case, in my opinion, are not applicable to the facts of this case. Hence the arguments advanced by the learned representative of the second party has no force and has to be rejected.

27. The services of the first party workman have been terminated on account of the nationalisation of the routes from Guruvainkere to Dharmasthala and that was also not disputed. It was also not disputed and it is also in the evidence of M. W. 1 Sri K. Narayana Shetty that booking agents of other routes who had put in less service than Tukarama Prabhu, the first party workman, are still in the service of the second party. Therefore it must be held that the first party workman was retrenched when the route from Gruvainkere to Dharmasthala was nationalised. Hence the first party workman, in my opinion, is entitled to compensation as it is admitted that the procedures contemplated in Section 25F of the Industrial Disputes Act was not followed. Therefore, it must be held that the termination of his services is not valid.

28. Both the parties have thought in this case that the agency of this first party or the services of the first party had to come to an end on account of the fact that the route between Guruvainkere and Dharmasthala had been nationalised and as the buses of the second party not ply to and from Dharmasthala. Therefore it cannot be ruled out that the second party honestly believed that the first party was only an independent contractor of the

second party and as such it might not have given any notice of retrenchment nor have taken the trouble of transferring him to some other place. Therefore, I am of the opinion that this is a fit case in which compensation should be awarded to the first party workman as laid down in Anglo-American Direct Tea Trading Company Ltd. *vs.* Workmen of Nahortoli Tea Estates (1961 II LLJ. P. 625). In that casee the following observation has been made at page 629 :—

" We feel that though the Appellate Tribunal was wrong in splitting up the compensation in two parts as it did, there would have been no reason for interfering with its order if it had given compensation for unjustified and premature termination of employment at the rate of one month's average pay per completed year of service. Now, in a case of proper retrenchment law allows compensation at the rate of fifteen day's average pay for each completed year of service ; it stands to reason that where a workman loses his job on account of unjustified and premature termination of employment, he should get something more than what he woul have got as compensation if it was a proper case of retrenchment. In such a case we do not think that the award of one month's average pay for each completed year of service would be an excessive compsenation for unjustified and premature termination of employment."

Applying the above principles stated above to the facts of the present case, it must be held that the first party workman is entitled to get one month's average commission which he was getting, for each completed year of his service. It must be held that the first party workman because an 'employee' of the second party only after the coming into force of the Motor Transport Workers Act, 1961, *i.e.*, with effect from 1st February 1962. Therefore his services from 1st February 1962 till his services came to an end (20th August 1968) should be taken into consideration. If that is taken the first party workman has completed only 7 years of service under the second party. The average commission which he was getting can be gathered from Exhibits M-8 to M-14. As the parties have not

placed any other evidence, I have to rely on the above mentioned Exhibits to calculate the average monthly commission of the first party workman. The average amount of commission per month which the first party workman was getting comes to about Rs. 168. So, for 7 years of completed service the first party workman is entitled to a compensation of Rs. 1,176.00 at the rate of one month's average commission for each completed year of service.

29. It is not disputed also that the second party has not paid bonus for the first party workman for the years 1964, 1965, 1966, 1967 and 1968 which he has claimed. In this regard also there is no evidence as to what percentage of the salary was paid as bonus. But there is the evidence of the first party workman that he was being paid Rs. 60 every year as Bonus. Therefore, calculating at that rate, the first party workman will be entitled to Rs. 300 as bonus for the years 1964 to 1968 claimed by him.

30. In this case, I am of the opinion, that the first party workman cannot be reinstated and reinstatement is not the proper order in this case as it is very clear that he was only a booking agent. Although I have held that he became a motor transport worker, if he is transferred to some places where there is no booking of passengers or very little of booking of passengers the first party workman will be put to great difficulty. On the other hand he will have to leave also Dharmasthala which seems to be his permanent abode and the second party will also be put to difficulties because they have to transfer their booking agents from place to place in case the first party workman is reinstated. Therefore, compensation is awarded to the first party as mentioned above, in lieu of reinstatement.

31. For all the reasons stated above, I answer the additional issues in the following terms:—

(1) The present dispute is an industrial dispute and this court has jurisdiction to adjudicate upon this dispute.

(2) There was relationship of employer and employee between the second party and the first party with effect from 1st February 1962 when the Motor Transport Workers Act, 1961 came into force and the first party workman was 'workman' as defined under Section 2(s) of the Industrial Disputes Act, 1947. The first party was working as commission agent under the second party and also under other transport companies who had the business of plying the bus service from and to Dharmasthala and that the second party had not much control or direction over the first party Sri Tukaram Prabhu.

(3) The first party is entitled to bonus for the years 1964 to 1968 after the termination of his service.

32. In view of my findings on the additional issues and also for all the reasons stated above. I answer the points of dispute in the terms that the management of Manjunath Motor Service, Udipi, was not justified in terminating the services of Shri Tukaram Prabhu with effect from 20th August 1968 and in refusing to pay bonus for the years 1964, 1965, 1966, 1967 and 1968. But I hold that the first party workman is not entitled to reinstatement with backwages and continuity of service. The first party workman Sri Tukaram Prabhu is held entitled to a sum of Rs. 1,476 (Rupees one thousand four hundred and seventy six only) as compensation for unjustified termination and bonus. I pass an award directing the second

party management to pay a sum of Rs. 1,476 to the first party workman in lieu of reinstatement. In the circumstances of the case, the parties are directed to bear their respective costs.

Sd./-

Mangalore, (H. S. Venkatasubbaiah),
Presiding Officer,

Dated : 16th September 1974. Labour Court, Mangalore.